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In the Supreme Court of the United States.

OCTOBER TERM, 1983.

JUSTICES OF THE BOSTON MUNICIPAL COURT,
PETITIONERS,
v.
MICHAEL LYDON,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for the American Civil Liberties Union and the Civil Liberties Union of Massachusetts, *Amici Curiae*, Urging Affirmance.

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INTEREST OF THE AMICI*

The American Civil Liberties Union is a nation-wide, non-partisan organization of over 250,000 members. The Civil Liberties Union of Massachusetts is one of its state affiliates. Continuously since its founding in 1920, amicus American Civil Liberties Union has sought to protect the fundamental rights guaranteed by the Constitution, and to prevent violations of those rights, often by appearing as amicus in this court. Amici hope that an argument presented by an organization experienced and concerned with protecting constitutionally guaranteed liberties will aid the Court in resolving the important constitutional question presented by this case.

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*Letters consenting to the filing of this brief have been lodged with the clerk.

SUMMARY OF ARGUMENT

Massachusetts maintains a two tiered district court system which permits a criminal defendant to appeal to a trial de novo following conviction at a first tier bench trial. Respondent Michael Lydon was tried and convicted on a charge of possession of burglarious implements at the first tier. Exercising its habeas corpus jurisdiction, the United States District Court found that the Commonwealth had failed to present sufficient evidence to warrant conviction. The question addressed by this brief[1] is whether the Commonwealth may now retry Mr. Lydon at the second tier, when this Court has ruled in Burks v. United

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[1] Amici do not address another issue raised by the petitioner, namely whether habeas corpus relief was granted pursuant to a proper exercise of the U.S. District Court's jurisdiction, but support the arguments on that issue offered by the respondent.

States, 437 U.S. 1, 11 (1978) that "the Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."

The Commonwealth argues that Burks is inapplicable to the case at bar because the Double Jeopardy Clause is not offended by permitting the prosecution a second chance to prove its case in a de novo system. Amici submit, however, that the Double Jeopardy Clause was designed to guard against precisely the ills that Mr. Lydon would suffer were he required to stand trial again. Long before Burks, the decisions of the Court concerning both mistrials and government appeals had established a clear and sensible standard: the government is entitled to no more and no less than one full and fair opportunity to prove its case.

By denying the government a "second crack" at mustering evidence sufficient to convict, the Double Jeopardy Clause protects the defendant from the physical, emotional and financial burdens of multiple trials, and reduces the possibility of an innocent man's conviction.

Similarly, the Commonwealth suggests that there is no government oppression involved in requiring the defendant to forfeit his double jeopardy protection in exchange for receiving the two opportunities for acquittal allegedly provided by the de novo system. However, Mr. Lydon never received the theoretical benefit of "two bites at the apple", which is precisely why the double jeopardy issue arose. Had he received an actual opportunity for acquittal at the

first tier, he would have been found not guilty following the Commonwealth's failure of proof.

Affirming the judgment below poses no significant burden on the state or federal judiciary. Since April, 1983, Massachusetts has required an explicit waiver of double jeopardy rights by any defendant choosing to be tried under the de novo system. However, even without requiring waiver, Massachusetts and other states could easily comport with the Burks rule. A double jeopardy hearing, whether at the second tier of a state system or in federal court, would be invoked only by the small proportion of criminal defendants challenging evidentiary sufficiency, would be quicker and simpler to resolve than many pre-trial motions, and would conserve judicial resources otherwise expended in improper and unnecessary jury trials.

Affirmance of the judgment below will have a salutary effect on those two tiered systems which do not require a double jeopardy waiver. This Court has long noted that the Double Jeopardy Clause plays an essential role in preventing irrational or bad faith judicial rulings designed to afford the prosecution a better opportunity to convict at a second trial. It is therefore to be expected that first tier courts operating without this safeguard would produce an inordinate number of convictions unsupported by sufficient evidence, leaving the prosecutor to try again on a better day. Numerous studies in Massachusetts and elsewhere have indeed found that first tier courts often invert the burden of proof and have identified lack of any review as a major cause of this problem. The existence of a limited double jeopardy inquiry,

whether by the state or federal judiciary, will encourage first tier judges to apply the constitutionally required burden of proof, as well as protect the defendant's constitutional right not to be twice placed in jeopardy.

I. THE DOUBLE JEOPARDY CLAUSE PROHIBITS RESPONDENT'S RETRIAL

A. When the Prosecution Has Been Unable to Prove its Case at a Full Hearing, the Double Jeopardy Clause Does Not Permit the Prosecution a Second Opportunity.

Respondent Lydon was tried and convicted in the Boston Municipal Court on a charge of possession of burglarious implements. The United States District Court found that the prosecution had failed to prove Mr. Lydon's guilt.[2] The petitioners do not dispute that Mr. Lydon

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[2] Lydon v. Justices of the Boston Municipal Court, 536 F. Supp. 647, 652 (D. Mass. 1982).

should have been acquitted at the bench trial, but seek to reverse the judgment of the Court of Appeals so that the Commonwealth may have a second chance to marshal sufficient evidence to convict, despite the clear command of Burks v. United States, 437 U.S. 1, 11 (1978) that:

> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials.

In his dissent in the Court below, Judge Campbell viewed retrying Lydon as perhaps logically barred by the language of Burks,[3] but saw "little ground for serious concern that the policy underlying the Double Jeopardy Clause is being

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[3] Lydon v. Justices of the Boston Municipal Court, 698 F.2d 1, 11 (1st Cir. 1982) (Campbell, J., dissenting).

offended."[4] It is therefore worthwhile to examine briefly that policy as enunciated by Supreme Court decisions. In the view of amici, these decisions create a consistent, sensible standard which protects both the state's interests and the defendant's interests by permitting the prosecution no more and no less than one full opportunity to prove its case.

The Supreme Court has consistently held that where the prosecution has had a fair opportunity to prove its case but has failed to do so, the Double Jeopardy Clause forbids the prosecution a second chance. This principle has been vindicated in a variety of contexts. In Downum v. United States, 372 U.S. 734, 736 (1963), the trial judge had dismissed the jury because a prosecution witness

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[4] Id. at 11.

was not present. The Supreme Court barred retrial since the mistrial was declared to afford the prosecution a more favorable opportunity to convict. Accord, Gori v. United States, 367 U.S. 364, 369 (1961) (dictum); United States v. Jorn, 400 U.S. 470, 485 (1971) (dictum). See also Swisher v. Brady, 438 U.S. 204, 215-216 (1978) and United States v. Wilson, 420 U.S. 332, 352 (1975) (approving certain appellate procedures only after insuring that they did "not provide the prosecution that forbidden 'second crack'.") The same reasoning precludes review of a jury verdict of acquittal, "the most fundamental rule in the history of double jeopardy jurisprudence". Sanabria v. United States, 437 U.S. 54, 64 (1978), quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). Even in a death penalty sentencing case, this Court found

that "having received 'one fair opportunity to offer whatever proof it could assemble,' . . . the State is not entitled to another" under the Double Jeopardy Clause. Bullington v. Missouri, 451 U.S. 430, 446 (1981).

In Burks, applying this principle in circumstances directly applicable here, this Court unanimously held that appellate reversal on grounds of insufficient evidence precludes a retrial. Although an appellate court rather than jury verdict had established that the evidence was insufficient, in either case retrial would allow the government an unconstitutional second chance to prove a case it failed to make the first time.[5]

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[5] Burks, 437 U.S. at 15-16. In Hudson v. Louisiana, 450 U.S. 40 (1981), this Court refused to restrict Burks to cases of appellate reversal, holding that a trial judge's granting of a new trial on grounds of evidentiary insufficiency precluded a second trial.

The petitioners' position that double jeopardy protection depends on the nature of the reviewing court would render both the language and rationale of these cases essentially meaningless by creating "a purely arbitrary distinction between those [convicted despite insufficient evidence of guilt] and others who would enjoy the benefit of a correct decision by the District Court."[6]

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[6] Burks, 437 U.S. at 11. Had the first tier judge dismissed the case against Lydon on grounds of insufficient evidence, as the Commonwealth concedes he should have, reprosecution would have been prohibited by the Double Jeopardy Clause. Costarelli v. Commonwealth, 374 Mass. 677, 682-683 (1978). Here, as in Burks, the protection of the Double Jeopardy Clause should not be lost simply by virtue of an incorrect ruling by the trial judge.

Although the Commonwealth seeks to limit application of Burks by arguing that the United States District Court's finding of insufficiency cannot sustain a double jeopardy claim, Commonwealth's Brief at 59-61, there is no valid reason why the identity of the court making the insufficiency finding -- trial, appellate, or federal court -- should

If retried, Michael Lydon would suffer all the ills that the Double Jeopardy Clause was intended to prevent. First, as expressed in Green v. United States, 355 U.S. 184, 187-188 (1957), allowing the state with all its resources and power to make a second attempt to meet its burden enhances "the possibility that even though innocent he may be found guilty." Retrial will permit the prosecution to shore up its weaknesses as revealed at the first trial. This Court has also noted that the opportunity to change prosecution testimony at a second trial threatens conviction of an innocent

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matter. See, e.g., Burks; Delk v. Atkinson, 498 F. Supp. 1282, 1285 (M.D. Tenn. 10th Cir. 1980), rev'd. on other grounds 665 F.2d 90 (6th Cir. 1981). See also United States v. Wilkinson, 601 F.2d 791 (5th Cir. 1979) and United States v. Bodey, 607 F.2d 265 (9th Cir. 1979).

defendant.[7] Moreover, regardless of whether additional evidence is submitted at the second trial, the expense and personal strain involved in contesting a second prosecution increases the risk of wrongful conviction by simply "wearing down" an innocent defendant. United States v. Scott, 437 U.S. at 91; Tibbs v. Florida, 457 U.S. 31 (1982); Bullington v. Missouri, 451 U.S. 430, 446 (1981).[8]

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[7] Arizona v. Washington, 434 U.S. 497, 504 n.14 (1978) quoting Carsey v. United States, 129 U.S. App. D.C. 205, 208-209, 392 F.2d 810, 813-814 (1967). United States v. Scott, 437 U.S. 82, 105 n.4 (1978) (Brennan, J., dissenting), ("not uncommon" that the government, like any litigant, will take advantage of this opportunity to alter testimony at second trials.)

[8] It is no answer to say that "while the de novo trial allows the prosecution to put in a different and perhaps stronger case, the same is of course true for the defendant," Lydon v. Justices of the Boston Municipal Court, 698 F.2d 1, 12 (1982) (Campbell, J., dissenting), since the Double Jeopardy Clause prohibits repeated prosecutions without reference to other procedural rights conferred on

Second, retrial would impose on Mr. Lydon the physical burdens, continuing anxiety, public embarrassment and expense inherent in multiple trials, which are interests clearly protected by the Double Jeopardy Clause. Abney v. United States, 431 U.S. 651, 661 (1977); Breed v. Jones, 421 U.S. 519, 529-30 (1975); Green v. United States, 355 U.S. 184, 187-188 (1957).[9]

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the defendant. The Double Jeopardy Clause does not merely confer symetrical rights on both parties, but protects one party -- the defendant -- against a specifically delineated state encroachhment. United States v. Wilson, 420 U.S. 332, 352 (1975).

[9]As a Massachusetts judicial commission reported in 1976, a defendant required to vindicate his rights in a second trial suffers "unfair burdens": "The defendant obtains his second trial only by submitting twice to the strenuous preparation involved in defending a lawsuit: securing witnesses, consultations with an attorney, development of trial tactics and ultimately a potentially lengthy trial. . . Defendants with low incomes who do not qualify for court appointed counsel may well find the extra cost of

The Double Jeopardy Clause permits retrial only to assume the prosecution one full and fair opportunity to prove its case.[10] Where that opportunity has been frustrated by trial error,[11] a genuinely deadlocked jury,[12] or circumstances creating a manifest necessity for mistrial,[13] the Supreme Court has

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two trials prohibitive." Report of the Special Committee on Trial de Novo to the Chief Justice of the District Courts, January 1976, at 16.

See also Feely, The Process Is the Punishment: Handling Cases in Lower Criminal Court, 199-200 (1980).

[10] United States v. Scott, 437 U.S. 82, 100 (1978); Arizona v. Washington, 434 U.S. 497, 505 (1978); Burks v. United States, 437 U.S. 1, 15 (1978).

[11] United States v. Ball, 163 U.S. 662 (1896).

[12] United States v. Perez, 9 Wheat. 579 (1824); Arizona v. Washington, 434 U.S. 497, 509 (1978) (dictum).

[13] Arizona v. Washington, 434 U.S. 497 (1978) (defendant's prejudicial statement created manifest necessity for mistrial); Illinois v. Somerville, 410 U.S. 458 (1973) (defective indictment created

permitted the defendant to be retried so that "the public's interest in fair trials designed to end in just judgments" may be preserved.[14] But in Lydon, society's interest in a fair resolution of culpability has been fully served. As in Burks, "the prosecution cannot complain of prejudice, for it has been given

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manifest necessity for mistrial); United States v. Jorn, 400 U.S. 470 (1971) (judge's belief witnesses should be warned of possible incrimination created no manifest necessity; retrial barred); Wade v. Hunter, 336 U.S. 684 (1949).

[14] Arizona v. Washington, 434 U.S. 497, 516, (1978) quoting Wade v. Hunter, 336 U.S. 684, 689 (1949). In Arizona v. Washington 434 U.S. at 505, the Court noted that "retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused." In United States v. Scott, 437 U.S. 82, 98 n.11 (1978), the Supreme Court expressed its readiness to distinguish "between those rulings which relate to 'the ultimate question of guilt or innocence' and those which serve other purposes." The United States District Court's finding of insufficiency is in the former category, barring retrial.

one fair opportunity to offer whatever proof it could assemble."[15] The alleged inconvenience to the Commonwealth's two tier system cannot justify jetisoning these core purposes of the Double Jeopardy Clause.

B. Mr Lydon Did Not Lose His Constitutional Protection Against Double Jeopardy By Choosing to Participate in the De Novo System.

Mr. Lydon's position should be impossible under our constitutional system: convicted without proof, sentenced to a two-year commitment, facing a second prosecution and all the ills the Double Jeopardy Clause was intended to prevent. Nevertheless, ignoring the well-settled precedent detailed above, the Commonwealth argues that "this is not a situation which the Double Jeopardy Clause is

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[15] Burks at 16.

designed to protect against,"[16] since the respondent sacrificed any protection under that Clause when he chose the benefits that the de novo system confers:

> As the dissenting opinion [in the First Circuit] recognizes, in foregoing a right to appeal at the first tier, "convicted defendants gain the right not to be convicted finally unless the prosecution twice proves their guilt beyond a reasonable doubt."[17]

The Commonwealth cannot and does not argue that Mr. Lydon made a "knowing and voluntary waiver" of his double jeopardy rights,[18] since none appears in the

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[16] Petitioner's Brief at 64.

[17] Id. at 66.

[18] Waiver of double jeopardy rights must be knowing and voluntary. Green v. United States, 355 U.S. 184, 191 (1957). This is an application of the standard for waiver of a constitutional right set out in Johnson v. Zerbst, 304 U.S. 458 (1938).

The United States District Court in the case at bar found that "there is no evidence that Lydon had a 'meaningful choice' and made a 'voluntary knowing relinquishment of a right.'" Lydon v. Justices, 536 F. Supp. 647, 651 (1982).

record. Rather, it seems to argue that the system is so fair to the defendant that there is no government oppression of the kind the Double Jeopardy Clause was intended to prevent, and therefore no violation.

Even if the respondent had indeed received two opportunities for acquittal, double jeopardy protection does not evaporate when a defendant is granted unrelated statutory rights. "Where the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced."[19] In any case,

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[19] Burks v. United States, 437 U.S. 1, 11 n. 6 (1978). In Burks, it was no answer to the defendant's double jeopardy claim that by offering appellate review, which need not be provided under Griffin v. Illinois, 351 U.S. 12 (1956), the defendant could fairly be deprived of his double jeopardy protection.

Likewise, in Breed v. Jones, 421 U.S. 519 (1975), the benefits conferred on the defendant choosing to be tried as a juvenile did not justify an imposed waiver of his double jeopardy rights.

however, to justify "forfeiture" or "waiver" on this benefit ignores the obvious fact that Mr. Lydon never received "two opportunities for acquittal", since when the evidence was insufficient at the first tier he was convicted, not acquitted. Although the Commonwealth correctly quotes Ludwig v. Massachusetts, 427 U.S. 618, 632 (1976) as holding that "nothing in the Double Jeopardy Clause prohibits a state from affording the defendant two opportunities to avoid conviction and secure an acquittal," that case is completely inapposite where it is the government, not the defendant, that would get the "second bite at the apple."

The Commonwealth would justify an imposed forfeiture of Mr. Lydon's double jeopardy protection because some other defendants have benefited from the de novo system. But it is only because Mr.

Lydon never obtained the de novo system's theoretical benefit that the double jeopardy claim arose. It is important to remember that whenever a first tier defendant's double jeopardy interest is at stake, it is because the de novo system failed to protect that defendant's basic right to be convicted only on sufficient evidence.

II. THE DOUBLE JEOPARDY CLAUSE IS IMPORTANT TO THE FAIR OPERATION OF THE DE NOVO SYSTEM.

The protection against double jeopardy attaches to all trials and even, in some instances, to sentencing procedures that "resemble a trial".[20] There can be no question that first tier trials conducted in a de novo system are subject to the requirements of the Double Jeopardy Clause, as this court made clear

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[20] Bullington v. Missouri 451 U.S. 430, 444 (1981).

in Ludwig v. Massachusetts, 427 U.S. 618 (1976).[21]

There is good reason to believe, however, that double jeopardy protection is especially important in the de novo system. The studies detailed below have shown that more than any other judicial forum, first tier trials are too often hasty affairs with unreliable fact-finding and an inverted burden of proof. These studies have consistently identified lack of review as a major factor responsible for the lower quality of

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[21] In Ludwig, which did not involve a bench trial conviction based upon insufficient evidence, this court held:

> A defendant who elects to be tried de novo in Massachusetts is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a new trial.

Ludwig, 427 at 631-632.

justice in first tier courts. Affirming the judgment below will have a significant salutary impact on the quality of justice in those states which choose to provide a double jeopardy determination to defendants convicted in the first tier.[22]

A. Convictions on Insufficient Evidence Are a Recurrent Problem in District Court Bench Trials.

The Massachusetts district courts have jurisdiction to try all misdemeanors, and all felonies punishable by not more than five years in the state prison.[23] In terms of sheer numbers of criminal cases tried, the district courts

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[22]Some states may instead choose to require waiver of double jeopardy rights by a defendant electing to be tried by a de novo system. In such states, affirmance of the judgment below will neither burden nor benefit the operation of the two tier system in any way.

[23]Mass. Gen. Laws c. 218, §26.

are the most important trial courts in the Commonwealth.[24]

Several studies have examined the Massachusetts district courts and the de novo system. Perhaps the most comprehensive study was The Quality of Justice in the Law Criminal Courts of Metropolitan Boston by Stephen Bing and S. Stephen Rosenfeld, published in 1970.[25]

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[24]The de novo system serves several important functions. It can provide speedier and less costly adjudications than other trial systems. Colten v. Kentucky, 407 U.S. 104, 114 (1972). When working properly, it serves an essential screening function, keeping unmeritorious prosecutions out of the jury session and discouraging frivolous defense appeals to the jury session. For the rare defendant who appeals to the second tier, it provides discovery at the first tier. Ludwig v. Massachusetts, 427 U.S. 618, 627 (1976). Finally, in theory the de novo system provides a second opportunity for acquittal on the facts.

[25]This report was written under the auspices of the Lawyer's Committee for Civil Rights Under Law and the Governor's Committee on Law Enforcement and the Administration of Justice. Its findings were based on the study of 1,428

In 1975, the Chief Justice of the Massachusetts District Courts appointed six judges to a "Special Committee on Trial De Novo", which issued its report in January, 1976.[26] A third report was published in 1976 by the Governor's Select Committee on Judicial Needs, chaired by Archibald Cox and better known as the Cox Commission.[27] Additionally, many commentators have written analyses

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defendants charged with 2,192 crimes. Bing & Rosenfeld at viii.

[26]This Committee examined the effect of the de novo system on the quality of justice in the district courts. It based its findings on the experience of the member judges, the annual statistics of the district and superior courts, and the results of two surveys. Report of the Special Committee at 2-3.

[27]Report on the State of the Massachusetts Courts, by the Governor's Select Committee on Judicial Needs (1976). The Cox Commission's report was a comprehensive study of the workings of the Massachusetts trial courts. Many of its recommendations were approved in 1978 when the Massachusetts court system was reorganized.

of the Massachusetts District Court system.[28] Although the de novo system system was made optional in 1978,[29] these studies still describe the dispensation of justice in the vast majority of cases which continue to be conducted under the two-tiered de novo system.[30]

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[28] E.g. Henry Lummus, Justice of the Supreme Judicial Court, The District Courts of Massachusetts, 7 Mass. L.Q. 27 (1922); G. Joseph Tauro, The State of the Judiciary -- Annual Report of the Chief Justice of the Massachusetts Supreme Judicial Court, 60 Mass. L.Q. 241, 261 (1975); J. Robertson & O. Walker, Trial De Novo in the Superior Court: Should it be Abolished -- Two Views, 56 Mass. L.Q. 347 (1971).

[29] Perhaps partly because of the findings published in these studies, Massachusetts in 1978 passed the Court Reorganization Act, St. 1978, c. 478. This legislation (1) allows a defendant to choose between an immediate jury trial or a bench trial with appeal de novo, and (2) provides that the de novo trial be held before a six-person district court jury rather than a twelve-person superior court jury.

[30] It should be noted that long before this court decided Argersinger v. Hamlin, 407 U.S. 25, Massachusetts was appointing counsel for indigents in all jailable

Although the above studies and articles, representing the views of Supreme Judicial Court Justices, District Court Judges, practicing attorneys, and law professors, differ as to the wisdom of retaining the de novo system, there is wide agreement that the first tier bench trial is its weak link. Bing and Rosenfeld,[31] Robertson,[32] and the District Court Judges[33] all indicate that the Lydon situation -- conviction on insufficient evidence -- is a common problem. From their study of 1,400 cases, Bing and Rosenfeld identified the standard of proof generally demanded by

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offenses under Mass. Supreme Judicial Court Rule 3:10. See MacDonnel v. Commonwealth, 353 Mass. 277 (1967). This important reform was in effect at the time of the three studies cited above.

[31] Bing & Rosenfeld at 106.

[32] Robertson, 56 Mass. L.Q. at 351.

[33] Report of the Special Committee at 14.

district court judges as a preponderance of the evidence, not proof beyond reasonable doubt,[34] and quote one judge they observed as declaring, "I don't know who to believe. Just to be safe I'll find you guilty."[35] They found that certain of the Boston area courts "seriously abuse principles of fairness and due process," adjudicating cases on "considerations unrelated to guilt or innocence."[36] For example, a poor defendant was substantially more likely to be convicted whether or not he was represented by appointed counsel.[37]

Several factors combine to distort the fact-finding process and eliminate the prosecutor's burden of proof. Most

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[34] Bing & Rosenfeld at 82-83.

[35] Id. at 83.

[36] Id. at viii.

[37] Id. at 32-34, 126-127.

often identified is the lack of any review on the record.[38] Since bench trial transcripts are not scrutinized for error, first tier judges receive no guidance from appellate courts. Each judge, appointed to serve until his seventieth birthday by the Governor's Council,[39] is the unchecked arbiter of the law in his own court.[40] The District Judges found that appeal de novo had a "negative impact on the quality of justice in the District Courts," by discouraging adherence to rules of practice

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[38] Id. at 2, 26; Report of the Special Committee at 17-19; Robertson, 56 Mass. L.Q. at 352-353; Cox Commission at 31; Lumus, The Failure of the Appeal System (Mass. Prison Ass'n 1909) at 29; W. Bolster (Chief Justice, Boston Municipal Court), Criminal Appeals, 7 Mass. L. Q. 16, 25 (1922).

[39] Mass. Const. Pt. 2, Ch. 3, Art. 1.

[40] Bing & Rosenfeld at 26.

procedure.[41]

> Without appellate review, the District Courts are deprived of a corrective technique normally present in the judicial process ... The cycle is a vicious one. If the courts are not held accountable for error through direct review, occasionally they will act in a way not deserving of respect.[42]

Thus it has been reported that some district court judges openly proclaim that Supreme Court decisions are irrelevant in their court.[43]

A second factor diluting the burden of proof in the first tier is noted by the District Court Judges: the continuing working relationship between a

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[41] Report of the Special Committee at 17, 18.

[42] Id. at 18, 19.

[43] Bing & Rosenfeld at 81; R. Harris, In Criminal Court, 49 The New Yorker 45, 72 (April 14, 1973). A third Boston area judge is quoted as threatening a defense attorney with contempt of court if he mentioned the Supreme Court once more. Id. at 88.

community judge and police officers.

> Judges may tend to be case-hardened or prosecution-minded after sitting on criminal cases in a particular community for a substantial period of time. In many District Courts, the judges soon know the police by name; they see the same faces everyday and there is strong pressure to begin to think of themselves as members of the "Commonwealth's team."[44]

Additionally, the large volume of cases processed by the district court places a premium on moving cases and clearing the calendar, often requiring the most cursory consideration of individual cases. As this Court noted in Argersinger v. Hamlin, 407 U.S. 25, 34-36 (1972):

> In addition, the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of fairness of the result...
>
> That picture is seen in almost every report. "The misdemeanor

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[44] Report of the Special Committee at 14.

> trial is characterized by insufficient and frequently irresponsible preparation on the part of the defense, the prosecution, and the court. Everything is rush, rush." Hellerstein, The Importance of the Misdemeanor Case on Trial and Appeal, 28 The Legal Aid Briefcase 151, 152 (1970).

Other investigators have underscored the damage done by such "assembly line justice" to both the fact-finding process and the defendant's constitutional rights.[45] This conditions infects

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[45] E.g. Smith & Ehrman, The Criminal Courts in CRIMINAL JUSTICE IN CLEVELAND 282 (R. Pound and F. Frankfurter, ed. 1922) found that the speedy processing of criminal cases "results practically in depriving of his day in court the poor or ignorant petty offender". The system "affords opportunities either to escape the law by 'putting it over' the judge or hastily to punish the innocent.'" Another reporter in the same study found a normal rate in the Cleveland Municipal Court of about 2½ minutes per case. Bettman and Burns, Prosecution, in CRIMINAL JUSTICE IN CLEVELAND at 114.

Professor Samuel Dash reported in 1951 that the average time spent on a case in the Chicago Municipal Court was less than 2 minutes per case, with the result that crucial facts were often omitted or unheard by the trial judge. Dash, Cracks in the Foundation of

justice in the Massachusetts district courts. Journalist Richard Harris reported that on the day he observed the Boston Municipal Court, a single judge disposed of 24 cases in 2 hours and 15 minutes, or 6 minutes per case.[46]

Criminal Justice 46 Ill. L. Rev. 385 (1951).

The President's Commission on Law Enforcement and Administration of Justice found in 1967 that the volume of cases was a major problem of the lower courts:

> An observer in the lower criminal courts ordinarily sees a trial bearing little resemblence to those carried out under traditional notions of due process ... Speed is the watchword. Trials in misdemeanor cases may be over in a matter of 5, 10 or 15 minutes; they rarely last an hour even in relatively complicated cases. Traditional safeguards honored in felony cases loose their meaning in such proceedings; yet there is still the possibility of lengthy imprisonment or heavy fine.

President's Commission, Task Force Report: The Courts, 30 (1967).

[46]Harris, supra, at 69.

Bing and Rosenfeld reported that district court judges often viewed careful and zealous preparation by defense counsel as obstructing the the court.[47] Consequently, defense lawyers were reluctant to cross-examine vigorously, argue in summation, or develop legal defenses.[48] Of 2,000 cases studied, only ten motions were noted.[49] Legal arguments often pitted judge and defense counsel as adversaries.[50] Harris reported that one Boston Municipal Court Judge

> managed to get rid of all the lawyers from the Massachusetts Defenders Committee . . . by simply refusing to grant any of their motions. . . [R]ather than participate in the legal charade that was demanded of

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[47] Bing & Rosenfeld at 109.

[48] Id., 78, 80.

[49] Id. at 79.

[50] Id. at 80.

> them, the lawyers withdrew from the court altogether.[51]

The result of all this is a seriously distorted fact-finding process. Since there is little time and sometimes little inclination to develop evidence on either side, adjudication is often not based on whether the prosecution has met its burden of proof.

> Fact-finding ... turn[s] on rough rules of thumb, rather than on an orderly exploration of the individual case. . . Trials occur swiftly, often with the presumption of innocence and the burden of proof inverted.[52]

Several other factors often dilute the presumption of innocence and burden of proof. A first tier judge may feel that an erroneous conviction is relatively unimportant since the defendant can nullify it by appeal de novo.[53]

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[51] Harris at 46.

[52] Robertson, Rough Justice, xix.

[53] Bing & Rosenfeld at 84; Report of

While capable personnel can be found throughout the judicial system, the judges, district attorneys, and defense lawyers manning the first tier courts will sometimes be less experienced or less confident than the personnel found in superior court.[54] Finally, the district courts' failure to safeguard the presumption of innocence can create a vicious circle. Although the petitioners

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the Special Committee at 18.

As early as 1922, Supreme Judicial Court Justice Henry Lummus criticized the de novo appeal as stripping the first tier judge of power and responsibility, which he believed discouraged "caution, judgment, sanity and efficiency". Lummus, The District Courts of Massachusetts, 7 Mass. L.Q. 27, 28.

The Cox Commission (at 31) found that the ever present possibility of trial de novo in superior court "might unconsciously impair the performance of district judges". The U.S. National Advisory Commission on Criminal Justice Standards and Goals quoted studies suggesting that appeal de novo "reduces lower court incentive to improve." Courts 166 (1973).

[54] President's Commission at 32.

and the dissenter in the Court below both state that prosecutors have every incentive to submit their best case at the first proceeding,[55] that incentive is surely diminished when district attorneys, faced with their own large caseloads, can rely on the laxness of the first tier court rather than full preparation and proof.[56]

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[55] Petitioner's Brief at 66; Lydon v. Justices of the Boston Municipal Court, 698 F.2d 1, 12 (1st Cir. 1982) (Cambpell, J., dissenting).

[56] In Argersinger v. Hamlin, 407 U.S. 25, 35 (1972) this Court, quoting the President's Commission on Law Enforcement, noted that prosecutors often "walk into courtrooms to try simple cases as they take their initial looks at files." The Court cited another report finding "irresponsible preparation" on the part of the prosecution and defense. Id. Thus, little had changed in the sixty years since the Cleveland study reported that the prosecution was generally unprepared at trial, conducted no investigation, and merely presented what evidence the police had given them. Bettman and Burns, Prosecution, in CRIMINAL JUSTICE IN CLEVELAND 169 (Pound and Frankfurter, eds. 1922). See also, U.S. Nat'l. Advisory Commission on Criminal Justice Standards and Goals,

The problems of the first tier courts are compounded by their invisibility. These courts, immune from correction by an appellate court, also are not generally subject to rigorous public or governmental scrutiny. The virtually unanimous findings of the Massachusetts studies might surprise many who do not appear regularly in first tier courts, for reasons expressed a half a century ago by Roscoe Pound:

> The legal profession as a whole has little interest in petty prosecution, and when the facts are stated publicly, some of the best, most public spirited, and most respected members of the bar are not unlikely to assume that such things cannot be true and to denounce those who reveal them as agitators or ruckmakers.[57]

Courts 8, Washington, D.C. (1973) (problems of inadequate prosecutorial performance "especially acute in lower courts.)

[57] Pound, Criminal Justice in the American City, in CRIMINAL JUSTICE IN CLEVELAND,

The Massachusetts reports mirror the findings of numerous studies of the country's lower criminal courts. Almost every investigator of whatever era[58] -- judicial commission,[59] legal scholar,[60]

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609 (R. Pound and F. Frankfurter, eds. 1922).

[58] At a symposium on the lower courts in 1969, Dean Francis Allen reported that a survey of studies showed conditions in the lower courts essentially unchanged from the 1930's. "[L]ittle if any, improvement has occurred in many communities . . . [there is still] the same failure of justice and efficiency that had evoked disquiet in the early 1930's." Allen, Small Crimes and Large Problems: Some Constitutional Dimensions, in Mass Production Justice and the Constitutional Ideal (1970) (C. Whitebread, ed.).

[59] S. Seabury, In the Matter of the Investigation of the Magistrate's Courts in the First Judicial Department and the Magistrates thereof and of Attorneys-at-Law Practicing in Said Courts, [New York] Supreme Court, Appellate Division, First Judicial Department. Final Report (March 28, 1932).

[60] See, e.g., the symposium on lower criminal courts reported in Mass Production Justice and the Constitutional Ideal (C. Whitebread ed.

task force,[61] -- has agreed with the Wickersham Commission that these courts are "the least satisfactory part of our judiciary system".[62] Thirty-five years after the Wickersham Commission's report, the President's Commission on Law Enforcement and Administration of Justice

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1970); Criminal Justice in Cleveland (R. Pound and F. Frankfurter, eds. 1922); J. Robertson, Rough Justice: Perspectives on Lower Criminal Courts (1974) (introduction); S. Dash Cracks in the Foundation of Criminal Justice, 46 Ill. L. Rev. 385 (1951); R. Nutter, The Quality of Justice in Misdemeanor Arraignment Courts, 53 J. Crim. L. Crim. and P.S. 215-219 (1962).

[61] American Bar Association, Commission on Standards of Judicial Administration, Standards Relating to Court Organization, Chicago (1974); President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts, Washington D.C. (1967); U.S. Nat'l Advisory Commission on Criminal Justice Standards and Goals, Courts, Washington, D.C. (1973); Wickersham Commission (National Commission on Law Observance and Enforcement): Report on Criminal Procedure (1931).

[62] Wickersham Commission Report, Report on Criminal Procedure, 11 (1931).

wrote in a strikingly similar report:

> No findings of this Commission are more disquieting than those relating to the condition of the lower criminal courts. . . The many persons who encounter these courts each year can hardly fail to interpret that experience as an expression of indifference ... to the ideals of fairness, equality and rehabilitation... Every day in the court houses of metropolitan areas the inadequacies of lower criminal courts may be observed.[63]

This report and others found that misdemeanor courts give inadequate attention to constitutional requirements[64] and produce inaccurate fact-

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[63] President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts, 29-30 (1967).

[64] Id. at 31, quoted in Argersinger v. Hamlin, 407 U.S. 25, 35 (1972). Another commentator described the lower criminal courts as "characterized by a marked departure from the world of due process." A. Enker, Lower Courts in Whitebread at 186.

See also Robertson Rough Justice at xix.

finding,[65] both, of course, resulting in convictions of the innocent. In the past ten years, three national commissions have recommended the abolition of the state inferior courts.[66]

In sum, diverse studies indicate that a defendant in the first tier courts runs a significant risk of conviction even when the government fails to meet its burden. The problem is compounded by the fact that over 98% of

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[65] President's Commission, Task Force Report: The Courts, 31 (1967); SMith & Ehrman, The Criminal Courts, in CRIMINAL JUSTICE IN CLEVELAND 254-275 (R. Pound & F. Frankfurter eds. 1922); Robertson, Rough Justice at xix.

[66] American Bar Association, Commission on Standards of Judicial Administration, Standards Relating to Court Organization, Chicago (1974); President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts, 33, Washington D.C. (1967); U.S. Nat'l Advisory Commission on Criminal Justice Standards and Goals, Courts, 166, Washington, D.C. (1973) (recommending abolition of lower courts subject to de novo review).

defendants do avail themselves of a de novo trial,[67] often to avoid the strain and expense of a second trial.[68] Those incorrectly convicted who do appeal are

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[67]The Cox Commission reported that in 1974, 9% of complaints brought in the Massachusetts District Courts were appealed, and less than 1% were actually tried before a jury in the second tier court. Report on the State of the Massachusetts Courts at 31. In Rhode Island's two tier system, less than two percent of the cases were ultimately carried to the second tier. Id. at 33. Another investigation reported less than 0.5% of Mass. district court cases were tried de novo in 1969. Robertson and Walker, 56 Mass. L. Q. 347, 367, n.5.

[68]Report of the Special Committee at 15.

Also see Robertson, Trial De Novo in the Superior Court -- Should it be Abolished -- Two Views at 350. Robertson says that innocent defendants may not appeal because of such factors as the prospects of long waits, repeated court appearances, loss of work time, witness unavailability, further attorneys' fees, renewed bail, and the prospect of an increased sentence on appeal.

Bing and Rosenfeld disputed that the de novo system "overprotects" this vast majority of defendants:

> Our assessment, built upon our statistical study, leads us

still forced to submit to a second trial at which the prosecution will have a second, probably better chance to make a case.

A Supreme Court holding that the Double Jeopardy Clause requires a limited scrutiny of first tier trials for evidentiary sufficiency will predictably reduce the likelihood of such irrational and arbitrary judicial rulings. This Court has often noted that the "manifest necessity" standard guards against "bad-faith conduct by a judge [who declares a mistrial] . . . so as to afford the prosecution a more favorable opportunity to convict the defendant" at a second trial. Arizona v. Washington,

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> to conclude ... that the trial de novo process presents a substantial danger of injustice to defendants who do not receive this second trial.

At 4.

434 U.S. 497, 508 (1978), quoting United States v. Dinitz, 424 U.S. 600, 611 (1976).[69] It guards equally against simply incorrect rulings causing the same result. Arizona v. Washington at 504, quoting United States v. Jorn, 400 U.S. 470, 483 (1971). In Downum v. United States, 372 U.S. 734, 738 (1963), this Court noted that the Double Jeopardy

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[69]Many other cases have cited the danger of bad faith judicial rulings. In Green v. United States, 355 U.S. 184, 188 (1957) the Court explained that jeopardy must attach when the jury is sworn so as to prevent "a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing trial when it appears that the jury might not convict." The court has required a "manifest necessity" for mistrial, in part to prevent a trial judge from declaring a mistrial "to afford the prosecution a more favorable opportunity to convict. . ." Gori v. United States, 367 U.S. at 369; Downum v. United States, 372 U.S. at 736 (1963). Even where the defendant moved for mistrial, reprosecution might be barred when the motion was necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal. United States v. Jorn, 400 U.S. 470, 485 n. 12 (1971).

Clause protects the liberty of the citizen by preventing "unlimited, uncertain and arbitrary judicial discretion."

There is no reason why this important safeguard, deemed essential by the Supreme Court in every other forum, is less necessary in the de novo system. Bing & Rosenfeld found that all participants "come to recognize that the judge's personal power and personal prejudices overshadow established rules of law in the district courts."[70] The Lydon case, like the Massachusetts studies, demonstrates that the defendant in a first tier Massachusetts trial is as likely to be damaged by an irrational or even bad-faith ruling affording the prosecution a "second chance" as defendant Downum was, although the

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[70]Bing & Rosenfeld at 80.

mechanism would be a stigmatizing conviction rather than an unnecessary mistrial. Justice Stewart, dissenting in United States v. Jorn, 400 U.S. at at 489, stated that "there is no question" that the guarantee against double jeopardy would make another trial impermissible when the judge exercises his authority to help the prosecution obtain a second opportunity to convict. The Commonwealth, however, would leave the defendant stranded, placing the risk of judicial arbitrariness on the defendant, not the government.

III. THE BURKS RULE WOULD NOT SIGNIFICANTLY BURDEN THE DE NOVO SYSTEM.

The Commonwealth argues that affirming the judgment below will disrupt both the federal and state systems.[71] Judge Campbell's dissent in the court below suggested that the majority opinion

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[71] Petitioner's Brief at 69.

would require a restructuring of the whole de novo system.[72] As will be demonstrated, these fears are not borne out by the experiences of the state de novo systems.

Before examining the consequences of the Burks rule on the de novo system, amici submit that these consequences can hardly justify abrogation of Mr. Lydon's Double Jeopardy protection. As Burks stated, where the Double Jeopardy Clause is applicable its sweep is absolute and there can be no "balancing of equities."[73] This court discarded a similar argument in Breed v. Jones, 421 U.S. 519, 535 n. 15 (1975), finding that the indisputable difficulties imposed on juvenile proceedings by the Double Jeopardy Clause

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[72] Lydon v. Justices, 698 F.2d 1, 12 (1982) (Campbell J., dissenting).

[73] Burks v. United States, 437 U.S. 1, 11 n. 6 (1978).

"tell . . . us no more than that the Constitution imposes burdens on the functioning of government and especially of law enforcement institutions."

The Constitution would be meaningless indeed if any state legislature could successfully defend its choice of an unconstitutional system by pointing to the burdens that would result from conforming to constitutional rights. In this sense, the Commonwealth's complaint is a thinly disguised assertion that the constitutional right against double jeopardy survives only at the sufferance of the Massachusetts legislature, as the dissenters in the Supreme Judicial Court noted.[74]

The constitutional protection against double jeopardy, then, must

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[74] Lydon v. Commonwealth, 381 Mass. 356, 369-370 (1980) (Liacos, J., concurring in part, dissenting in part).

be observed, but within these confines there is abundant room for experimentation with alternative criminal justice systems, including the de novo system. Examination of the de novo system bears out the United States District Court's view that "[o]ur holding [granting Mr. Lydon's writ] ... need not eliminate nor even work substantial change in the operation of the Massachusetts two tier system."[75]

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[75] Lydon v. Justices of the Boston Municipal Court, 536 F. Supp. 647, 652 (D. Mass. 1982). Of course, since states are not constitutionally required to provide review, Griffin v. Illinois, 351 U.S. 12, 18 (1956), a particular state might do nothing, leaving any double jeopardy issue to be resolved by the federal judiciary. However, the states will almost certainly respond in the state system to a clear double jeopardy decision, as Massachusetts has already done. In Lydon v. Commonwealth, 381 Mass. 356, 360, n.7 (1980), the Massachusetts Supreme Judicial Court established that the second tier court was the proper place to raise a double jeopardy claim. In Commonwealth v. Montanez, 388 Mass. 603, 604 (1983), the

Massachusetts appears to have chosen one option which eliminates any real inconvenience to the two tier system stemming from the Double Jeopardy Clause: waiver. In Commonwealth v. Montanez, 388 Mass. 603, 605 (1983), the Massachusetts Supreme Judicial Court ordered that any defendant choosing the two tier system be required to waive his double jeopardy right prior to the first tier trial, at the same time he waives his right to a jury in the first instance.[76] Since

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Court stated that "if it were necessary in this case to do so, we would ... assume without deciding that the Federal Lydon decision reached a correct result under Federal law... We would take this course because our decision is reviewable in habeas corpus proceedings in a United States District Court which would be bound by the Federal Lydon decision." In Montanez, the state court responded to the Lydon decision by establishing a waiver procedure, as noted following.

[76] Amici intimate no view on the constitutionality of the Commonwealth's waiver requirement, which is outside the scope of this brief.

Massachusetts has been routinely obtaining such pre-trial waivers since April 29, 1983 with no apparent difficulty, it is hard to credit the Commonwealth's argument that the Lydon decision "affects the ability of the state to experiment in the area of criminal trial procedure and to provide practical advantages to the defendant..."[77]

Massachusetts and other de novo states need not resort to waiver, however, to comport easily with the Double Jeopardy Clause. Massachusetts, for example, could provide a double jeopardy determination for evidentiary sufficiency claims in the second tier without any restructuring of its present de novo system. In Lydon, 381 Mass. 356, 367 (1980), the Supreme Judicial Court noted that the mechanism for such a

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[77] Petitioner's Brief, at 67.

review is already in place:

> We conclude that the jury trial session [the district court's second tier] is the appropriate forum for consideration of double jeopardy claim [sic] asserted after a bench trial. If there is a valid double jeopardy claim, it should be dealt with before, rather than after, the second trial. . .
>
> Rule 13(c)(2) of the Massachusetts Rules of Criminal Procedure... provides that '[a] defense or objection which is capable of determination without trial of the general issue shall be raised before trial by motion.' Consequently, the defendant's motion to dismiss properly should have been considered on the merits in the jury trial session.

This second tier review could afford defendants their constitutional protection against double jeopardy in a simple, speedy and effective manner. In contrast to pre-trial motions to suppress or dismiss, which sometimes require a succession of witnesses and lengthy argument, a double jeopardy motion could be disposed of quickly. In Massachusetts, the second

tier judge would examine either a stipulation between the parties as to the content of the transcript, or a verbatim transcript of the first tier proceedings, which are now electronically recorded.[78] In Lydon, that transcript comprised only eleven pages.[79] Further, ruling on a double jeopardy motion would be relatively straight-forward. Unlike other pre-trial motions, the double jeopardy issue will never result in credibility contests or complex fact patterns; rather, the court will bar retrial if an

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[78]There may presently be some state systems which do not record first tier proceedings. Defendant's double jeopardy rights may be safeguarded in such states by any of several routes, such as: (1) a stipulation between opposing counsel as to the record; (2) a brief statement of facts written by the judge when a double jeopardy motion is filed; (3) instituting recording equipment; (4) arguably placing the burden on the defendant to insure that the proceedings are recorded.

[79]Petitioner's Brief, at 53 n. 16.

element was not supported by sufficient evidence, and "such a decision will be confined to cases where the prosecution's failure is clear."[80] The issue is easily handled in a summary procedure.[81]

In assessing the burden imposed by such a procedure, which may typically be adopted by other states to comport with the Burks requirement, it is well to point out that Massachusetts has offered similar procedural rights on the civil side for many years without difficulty. A civil litigant in district court may obtain a jury trial de novo, but he is first afforded (1) full appellate review of the first tier trial by a panel of state district court judges to consider any claims of reversible error, Mass.

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[80] Burks v. United States, 437 U.S. 1, 17 (1978).

[81] Abney v. United States, 431 U.S. 651, 662 n. 8 (1977).

G. L. c. 231, §108, and (2) another review of the transcript by the second tier judge to determine whether the appellate panel correctly ruled that there was no reversible error, for the purpose of determining the admissibility of the first tier finding at the de novo trial. Harrison v. Textron, Inc., 367 Mass. 540, 553 (1970). See Orasz v. Colonial Tavern, Inc., 365 Mass. 131 (1974).[82]

Different alternatives have been adopted by other two tier jurisdictions

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[82]A civil litigant in Superior Court, the court of general trial jurisdiction, has a right to review by a single justice of the Appeals Court on interlocutory orders. Mass. Gen. Laws c. 231, §118. Thus, Massachusetts has chosen to devote considerable judicial resources to safeguarding the right of a civil litigant to, for example, obtain the answer to a deposition question, while arguing that it would unduly burden the judiciary to protect a criminal defendant's constitutional protection against double jeopardy.

in order to comply with the Due Process Clause. In Pennsylvania, a defendant convicted at the first tier may elect whether to proceed with an appeal de novo or appeal on the record.[83] Or, as the United States District Court noted in its decision below,[84] the state could adopt Maryland's juvenile procedure, which precludes the prosecution from offering new evidence at the second level. See Swisher v. Brady, 438 U.S. 204 (1978). In sum, the multiplicity of alternatives demonstrate that the Burks rule need not place any substantial burden on the de novo system.

Petitioners also argue that

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[83] See Commonwealth v. Poindexter, 248 Pa. Super. 564, 375 A.2d 384 (1977), rev'd. on other grounds, 484 Pa. 472, 399 A.2d 390 (1979); Commonwealth v. Dincel, ___ Pa. Super. ___, 457 A.2d 1278 (1983).

[84] Lydon v. Justices of the Boston Municipal Court, 536 F. Supp. 647, 652 (1982).

affirming the judgment below will ultimately disrupt the federal system and cause "significant delay in the two tier system where those convicted in the bench trial may now avail themselves of yet a third federally created tier."[85] This Court rejected a similar argument in Abney v. United States, 431 U.S. 651, 662 n.8 (1977), which permitted an interlocutory review of a federal defendant's pretrial double jeopardy claim:

> . . .[W]e believe that such problems of delay can be obviated by rules or policies giving such appeals expedited treatment. It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy.

Additionally, the court below did not purport to provide every defendant with a right to interlocutory habeas

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[85]Petitioner's Brief at 69.

review of his first tier conviction, specifically limiting its holding to cases characterized by several factors present in the case at bar.[86]

As earlier noted, very few attorneys in Massachusetts first tier trials, most of whom are appointed, file any motions at all.[87] Of those defendants tried in the first tier, less than 2% availed themselves of de novo trials.[88] Less than 0.2% of defendants appeal from the second tier to the appeals court.[89]

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[86] Lydon v. Justices, 698 F.2d at 7. Those factors included the strength of the double jeopardy claim (at 6), the lack of any need for speedy trial expressed by either side, (at 5), and the unavailability of state appellate review, (at 5, 6).

[87] See supra, p. 35.

[88] See supra, p. 44, n. 67.

[89] From January 1, 1979, when final jurisdiction over a wide-range of criminal cases was conferred on the Massachusetts District Court, to March 31, 1980, only 22 appeals from the 1,465 second tier

It is therefore hardly likely that either the state or federal judiciary will be swamped with double jeopardy motions. The Petitioner's Brief can cite only four double jeopardy claims filed in federal court out of the several hundred thousand criminal cases held since the United States District Court's decision in Lydon.[90]

Finally, any consumption of judicial resources resulting from a double jeopardy review is likely to be offset in two ways. First, every double jeopardy claim which is sustained will eliminate the wasteful, far greater drain on judicial resources inherent in a jury

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cases were docketed in the Appeals Court, or 0.15%. Statistics derived from the docket books of the Appeals Court.

[90]Petitioner's Brief at 69, n.22. In 1980, 478,695 criminal complaints were disposed of by the Massachusetts district courts. 1982 Annual Report of the Massachusetts Trial Court at 28.

trial. This would help eliminate one of the burdens on judicial systems identified by the Cox Commission: lack of effective screening of unmeritorious cases before trial.[91] Second, to the degree that a double jeopardy review encourages judges generally to apply the proper burden of proof, fewer double jeopardy motions and fewer de novo trials will be necessary.

Like such earlier reforms as the Argersinger requirement and recordation of proceedings, affirmance of the judgment below will be remembered not as a burden or even an inconvenience, but as a necessary and natural step towards perfecting the quality of justice in the district courts.

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[91] Report on the State of the Massachusetts Courts at 62.

CONCLUSION

For the reasons stated above the judgment of the Court of Appeals for the First Circuit should be affirmed.

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